

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

JOSEPH JEROME WILBUR, *et al.*,

Plaintiffs,

v.

CITY OF MOUNT VERNON, *et al.*,

Defendants.

No. C11-1100RSL

ORDER COMPELLING MOUNTAIN LAW  
AND BAKER LEWIS SCHWISOW & LAWS  
TO COMPLY WITH SUBPOENAS

This matter comes before the Court on the “Motion for Protective Order by Mountain Law, PLLC and Baker Lewis Schwisow & Laws Third Party Respondents to Supboenas Duces Tecum.” Dkt. # 209. In September, defendants moved for an extension of the trial date in the above-captioned matter on the ground that their newly-constituted public defender systems may moot plaintiffs’ claims. Defendants had recently contracted with Baker Lewis to provide public defender services in Burlington and Mount Vernon. Baker Lewis formed Mountain Law to provide the services under the contract, assigning one of its partners, Michael Laws, and two other attorneys to Mountain Law. Plaintiffs opposed the extension of time, arguing that there were indications that the new public defender systems suffer the same constitutional deficiencies as the old systems and that a delay would cause prejudice. While that motion was pending, plaintiffs issued Rule 45 subpoenas duces tecum to Baker Lewis and Mountain Law seeking information regarding the contracting process, case loads, supervision by the municipalities, and the adequacy of the representation provided by the new public defenders.

ORDER COMPELLING COMPLIANCE  
WITH SUBPOENAS

1 Baker Lewis and Mountain Law seek a protective order on the grounds that Baker Lewis has no  
2 relevant information, that responding to the subpoenas would be unduly burdensome, and that  
3 client confidences are at risk. Baker Lewis and Mountain Law also object to plaintiffs'  
4 counsels' communication with their clients.

5 Having reviewed the memoranda, declarations, and exhibits submitted by the  
6 parties, the Court finds as follows:

7 (1) For the reasons discussed in the "Order Compelling Richard Sybrandy to Comply  
8 with Subpoena" (Dkt. # 179) and "Order Compelling Morgan Witt to Comply with Subpoena"  
9 (Dkt. #186), Mountain Law shall produce 50 randomly-selected public defense files that were  
10 closed after April 16, 2012. Although Mountain Law has not shown that these files contain  
11 attorney-client communications, some consideration must be given to the possibility that such  
12 communications exist within the fifty client files that will be produced. Mountain Law, as  
13 keeper of the privilege, shall review each of the fifty files and withhold from the production any  
14 documents that reveal communications and advice between the attorney and the client.<sup>1</sup> If a  
15 document is withheld or redacted on account of the attorney/client privilege, the withholding  
16 must be indicated in the production and a privilege log sufficient to allow interested parties to  
17 evaluate each claim of privilege must be provided. At a minimum, the privilege log must  
18 identify the nature of the document, its date and subject, the parties thereto (and their connection  
19 to this litigation, if not apparent), and any other information necessary to show that the  
20 attorney/client privilege applies.

21 The production ordered herein will be subject to the following terms and  
22

---

23 <sup>1</sup> To the extent the files contain work product, the material sought is central to plaintiffs' claims  
24 and, being entirely within the control of Mountain Law, cannot be obtained from other sources. It is,  
25 therefore, discoverable. See Pappas v. Holloway, 114 Wn.2d 198, 212 (1990). Use and further  
26 disclosure of the confidential and work product materials contained in these files is subject to the terms  
and conditions set forth below.

1 conditions:

2 (a) Confidentiality: The fifty files produced by Mountain Law shall be considered  
3 confidential. Any copies, excerpts, charts, summaries, or deposition testimony regarding the  
4 files that contain names (or other identifying information) of victims or witnesses or medical  
5 information related to any person shall also be considered confidential. The protections afforded  
6 these materials do not, under any circumstance, extend to information that is in the public  
7 domain, including the name of the client and any information maintained in Mount Vernon's and  
8 Burlington's public records.

9 (b) Access to and Use of Confidential Material: Plaintiffs' counsel may use  
10 confidential material only for prosecuting or attempting to settle this litigation and shall store  
11 and maintain the confidential material in a secure manner. Unless otherwise ordered by the  
12 Court or permitted in writing by the client associated with the file, plaintiffs' counsel shall  
13 restrict access to confidential material to their employees to whom it is reasonably necessary to  
14 disclose the information, the client associated with the file, the Court and its personnel,  
15 Mountain Law, and plaintiffs' experts and copy service personnel who sign the  
16 "Acknowledgment and Agreement to be Bound" attached as Exhibit A to this order. To the  
17 extent confidential material is disclosed at a deposition, each person in attendance other than  
18 those described above (but including defense counsel) shall sign the "Acknowledgment and  
19 Agreement to be Bound."

20 (c) Filing Confidential Material: If confidential material is to be filed with the  
21 Court, the material should be redacted if it is not necessary for the resolution of the underlying  
22 dispute. Otherwise, a motion to seal must be filed. Local Civil Rule 5(g) sets forth the  
23 procedure that must be followed and the standards that will apply when a party seeks permission  
24 to file confidential materials under seal. In addition, a copy of the motion to seal shall be served  
25 on Mountain Law.  
26

1 (2) Mountain Law shall supplement its previous production in response to requests 2-13  
2 and 15-18.

3 (3) To the extent Baker Lewis is completely divorced from the public defender systems  
4 in Burlington and Mount Vernon, it can simply state that it has no documents that are responsive  
5 to requests 1-11 and 14-16, thereby avoiding the burden associated with a substantive response.  
6 There is, however, evidence suggesting that Baker Lewis was intimately involved in the contract  
7 negotiations, that one of its name partners is working for both Baker Lewis and Mountain Law,  
8 that certain administrative functions and communication channels may be shared between the  
9 entities, and that Baker Lewis continues to correspond regarding the Burlington and Mount  
10 Vernon public defense systems. Thus, plaintiffs are entitled to responses from Baker Lewis  
11 regarding requests 1-11 and 14-16.

12 (4) To the extent Mountain Law was created to provide only public defense services to  
13 Burlington and Mount Vernon and its attorneys are so occupied, it can simply state that it has no  
14 records of time spent on or proposal submitted to other jurisdictions in response to requests 14  
15 and 24-26, thereby avoiding any burden associated with a substantive response. If, however,  
16 Mountain Law, its attorneys, or managers represent or have sought to represent indigent criminal  
17 defendants in other jurisdictions, this information would be relevant to evaluating Mountain  
18 Law's overall caseload, which is a key issue in this litigation.

19 (5) The other salient factor that goes toward evaluating the caseloads carried by the  
20 cities' public defenders is the number of attorneys performing the work. Although Mr. Lewis  
21 states that attorneys who provide public defender services to Burlington and Mount Vernon "are  
22 not assigned to any other contracts or work" (Dkt. # 217-1 at ¶ 4), Mr. Laws, one of three  
23 attorneys working for Mountain Law and a partner at Baker Lewis, states only that he does "not  
24 handle public defense for any other entities . . ." (Dkt. # 217-2 at ¶ 4). Mr. Laws holds himself  
25 out as a criminal defense and bankruptcy lawyer at Baker Lewis  
26

1 ([http://www.seattlecriminaldefenselawfirm.com/Attorney\\_Profiles/Michael\\_Laws.aspx](http://www.seattlecriminaldefenselawfirm.com/Attorney_Profiles/Michael_Laws.aspx)),  
2 suggesting that he spends only a portion of his time providing public defense services for  
3 Burlington and Mount Vernon. Plaintiffs are entitled to inquire further regarding Mr. Laws'  
4 time spent working on matters other than public defense for Burlington and Mount Vernon.  
5 Baker Lewis shall respond to request 13 to that extent. Plaintiffs have not, however, shown how  
6 the work activities of other Baker Lewis attorneys who are not providing public defense services  
7 to Burlington or Mount Vernon are relevant to their claims. No response to request 12 is  
8 necessary.

9 (6) Plaintiffs clearly intend to argue that Burlington and Mount Vernon turned a blind  
10 eye toward problems in their public defense systems and are responsible for deficiencies that  
11 would have been apparent had they adequately supervised and/or monitored their contractors.  
12 Documents related to the cities' efforts to supervise, monitor, and/or evaluate the public  
13 defenders' services are therefore relevant. Neither Mountain Law nor Baker Lewis has shown  
14 that production of these documents would be unduly burdensome or that they are necessarily  
15 available from the cities themselves. Mountain Law shall respond to requests 19-22 and Baker  
16 Lewis shall respond to requests 17-20.

17 (7) Complaints regarding the existence, timing, and/or quality of the public defense  
18 services offered by Mountain Law in Burlington and Mount Vernon may be relevant to  
19 evaluating the constitutional adequacy of the cities' public defense system. Mountain Law,  
20 which asserts that it serves only Burlington and Mount Vernon defendants, shall therefore  
21 respond to request 23. Baker Lewis shall respond to request 21 to the extent it has kites in its  
22 possession that were filed by clients assigned to either Mountain Law or Baker Lewis under the  
23 contracts with Burlington or Mount Vernon. Baker Lewis need not produce kites generated by  
24  
25  
26

1 clients assigned under its contracts with other municipalities.<sup>2</sup>

2 (8) As discussed above, accurately evaluating the public defense caseloads under the  
3 cities' new system is a key issue in this litigation. Mountain Law and Baker Lewis' policies  
4 regarding how they calculate per-attorney caseloads under the public defense contracts with  
5 Burlington and Mount Vernon are, therefore, relevant. Mountain Law shall respond to requests  
6 27 and 29, and Baker Lewis shall respond to requests 24 and 26.

7 (9) To the extent Mountain Law was created to provide only public defense services to  
8 Burlington and Mount Vernon and its attorneys are so occupied, it can simply state that it has no  
9 policies regarding caseload calculations in other jurisdictions in response to request 28. In the  
10 alternative, it must provide responsive documents. Plaintiffs have not shown how Baker Lewis'  
11 policies for counting caseloads in other jurisdictions are relevant to their claims. Baker Lewis  
12 need not respond to request 25.

13 (10) Documents regarding the invitation to bid, proposals, and negotiations that led up to  
14 Baker Lewis' contracts for public defense services with Burlington and Mount Vernon are  
15 clearly relevant. Baker Lewis has not shown that the production of these documents would be  
16 unduly burdensome and shall respond to requests 22 and 23 accordingly.<sup>3</sup> Plaintiffs have not,  
17 however, shown how Baker Lewis' invitations to bid or proposals submitted to other  
18 jurisdictions are relevant to their claims.

19 (11) Plaintiffs have not shown how Baker Lewis' contracts with other jurisdictions are  
20 relevant to their claims. Baker Lewis and Mr. Laws deny that any of the three attorneys  
21

---

22 <sup>2</sup> The fact that plaintiffs might be able to obtain this information from a different third party,  
23 namely Skagit County, does not make this request unduly burdensome or onerous.


24 <sup>3</sup> Conclusory assertions of undue burden are not persuasive. In addition, there is some reason to  
25 suspect that Baker Lewis has an exaggerated sense of what is burdensome, especially in the context of  
26 federal civil litigation, having argued that the production of a contract would be "extremely  
burdensome." Dkt. # 217 at 3.

1 providing public defense services to Burlington and/or Mount Vernon are representing indigent  
2 criminal defendants from any other jurisdiction. Baker Lewis need not respond to request 27.

3 (12) Mountain Law and Baker Lewis argue that class counsel is barred from  
4 communicating with the defendants assigned by Burlington or Mount Vernon absent the law  
5 firms' consent. The indigent criminal defendants are, however, members of the class that is  
6 represented by class counsel. Neither RPC 4.2 nor RPC 4.4 preclude a lawyer from  
7 communicating with his or her own client. Although the fact pattern presented here raises the  
8 possibility that an indigent criminal defendant may become dissatisfied with his or her defense  
9 counsel, there is no rule of law or ethics that prevents a criminal defendant from retaining  
10 counsel to defend the criminal charges against him while simultaneously hiring a separate  
11 attorney to litigate a civil action related to the same underlying facts. The indigent criminal  
12 defendant, having the advice of both counsel, may decide to share confidences, may choose to  
13 retain the individual public defender even as he challenges the constitutional adequacy of the  
14 system as a whole, or may seek appointment of conflict counsel to handle the criminal case. The  
15 Court finds no authority for the proposition that he has waived his ability to be represented by  
16 counsel in the civil suit merely because he has been charged with a crime.

17  
18 For all of the foregoing reasons, Baker Lewis and Mountain Law are directed to  
19 respond to the Rule 45 subpoenas as directed within twenty-eight days of this Order.

20  
21 Dated this 9th day of November, 2012.

22   
23 Robert S. Lasnik  
24 United States District Judge  
25  
26

**Exhibit A**

I, \_\_\_\_\_ [print or type full name], of  
\_\_\_\_\_  
[print or type full address], declare under penalty of  
perjury that I have read in its entirety and understand paragraphs (1)(a)-(c) governing the use and  
disclosure of confidential materials in this litigation. I agree to comply with and to be bound by all the  
terms of those paragraphs. I agree not to further disclose in any manner any confidential material to any  
person or entity.

Dated: \_\_\_\_\_

City and State where sworn and signed: \_\_\_\_\_

Printed Name: \_\_\_\_\_

Signature: \_\_\_\_\_